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ROSLI YUSOF v. PP

FEDERAL COURT, PUTRAJAYA
MOHD ZAWAWI SALLEH FCJ
NALLINI PATHMANATHAN FCJ
MARY LIM FCJ
B [CRIMINAL APPEAL NO: 05(M)-226-10-2019(P)]
25 JUNE 2021

C ***CRIMINAL PROCEDURE:*** *Prosecution – Duty – Accused person charged for trafficking in dangerous drugs – 112,892g cannabis found in car – Accused person's arrest led to arrest of others – Arrestees investigated and statements recorded by police – Prosecution did not offer arrestees as witnesses to defence – Whether prosecution has duty to make available, to defence, arrestees as witnesses – Dangerous Drugs Act 1952, s. 39B(1)(a)*

D ***EVIDENCE:*** *Defence – Witness – Accused charged for trafficking in dangerous drugs – 112,892g cannabis found in car – Accused person's arrest led to arrest of others – Arrestees investigated and statements recorded by police – Prosecution did not offer arrestees as witnesses to defence – Whether prosecution has duty to make available, to defence, arrestees as witnesses – Dangerous Drugs Act 1952, s. 39B(1)(a)*

E The appellant was arrested by the police inside a Toyota Avanza ('Toyota') filled with rice gunny sacks containing packed cannabis, all of which were confirmed to weigh 112,892g. Subsequent to his arrest, four other individuals were arrested ('arrestees'), including one Kamarul and a Thai national. The appellant was charged at the High Court, for trafficking in
F dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). After closing its case, the prosecution did not offer these arrestees/witnesses to the defence. The trial judge proceeded to order the appellant to enter his defence after being satisfied that the prosecution had established a *prima facie* case. In his defence, the appellant submitted that (i) he had no knowledge of the drugs found in the Toyota; (ii) Kamarul drove
G a Proton Persona ('Proton'), together with the appellant, to pick up the Toyota at a house; (iii) after picking up the Toyota, Kamarul drove it while the appellant drove the Proton; (iv) they met a Thai national with whom Kamarul had a conversation; one which the appellant was not privy to; (v) Kamarul then left the Toyota and joined the appellant in the Proton;
H (vi) after having a meal together, the appellant dropped off Kamarul nearby where the Toyota was parked; (vii) Kamarul, driving the Toyota, and the appellant, driving the Proton, agreed to meet again at a location; (viii) the appellant arrived at the said location first and when Kamarul arrived, he parked the Toyota next to the Proton; (ix) Kamarul appeared anxious and,
I without saying much, grabbed the keys to the Proton and sped off; and (x) within moments, the appellant was arrested by the police. At the end of the defence's case, the trial judge, having found that the defence failed to cast a reasonable doubt on the prosecution's case, convicted the appellant for the

offence and sentenced him to death. The appellant's appeal to the Court of Appeal was unsuccessful. Hence, the present appeal. The central issue in this appeal concerned the duty of the prosecution to make available to the defence any witness whose evidence may assist the accused in his/her defence.

Held (allowing appeal)
Per Mohd Zawawi Salleh FCJ delivering the judgment of the court:

(1) A person's right to defend himself/herself against a criminal charge includes the right to obtain and adduce other evidence in support of his/her defence. The prosecution has a duty to make available, to the defence, witnesses who have been investigated by the police and from whom the statements had been recorded. (para 46)

(2) The importance of the arrestees to the defence was clearly demonstrated from the evidence of the appellant who averred that Kamarul was the actual person who had full control of the Toyota in which the drugs were found and he was the person who had engaged in a conversation with the Thai national. The investigating officer confirmed that the drugs originated from Thailand as could be seen from the rice gunny sacks. The objective of a fair trial required the prosecution to call the arrestees or, at the very least, Kamarul and the Thai national as witnesses unless there was some good reason not to do so. These arrestees were persons who had been arrested contemporaneous or in proximity to the arrest of the appellant and pursuant to the same investigation. The prosecution did not proffer any explanation for the non-calling of these arrestees/witnesses. (paras 38-40)

(3) The investigating officer had investigated the arrestees and submitted investigation papers to the prosecution who then decided not to charge them. In the circumstances, the prosecution could not say that it did not know what evidence these witnesses would give because their statements had been recorded. Necessary arrangements should have been made by the prosecution to make them available to the defence during the proceedings at the High Court. (paras 43 & 44)

(4) The conviction and sentence under s. 39B(1)(a) of the DDA was set aside. The appellant's charge was reduced to one of possession under s. 6 and punishable under s. 39A(2) of the DDA. The appellant was sentenced to 18 years imprisonment with effect from the date of his arrest and ten strokes of the rotan. (paras 47-49)

Bahasa Melayu *Headnotes*

Perayu ditangkap oleh pihak polis di dalam sebuah Toyota Avanza ('Toyota') yang dimuatkan dengan beberapa guni beras berisi ganja, yang kesemuanya disahkan seberat 112,892g. Ekoran tangkapannya, empat individu lain turut ditangkap ('orang-orang kena tangkap'), termasuk seorang bernama Kamarul dan seorang warga Thai. Perayu dituduh di Mahkamah

Tinggi, kerana mengedar dadah, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada penutup kesnya, pihak pendakwaan tidak menawarkan orang-orang kena tangkap/saksi-saksi kepada pihak pembelaan. Hakim bicara meneruskan dengan memerintahkan perayu membela diri selepas berpuas hati pihak pendakwaan telah membuktikan satu kes *prima facie*. Dalam pembelaannya, perayu menghujahkan bahawa (i) dia tidak tahu tentang dadah yang dijumpai dalam Toyota; (ii) Kamarul memandu Proton Persona ('Proton'), bersama-sama dengan perayu, untuk mengambil Toyota tersebut di sebuah rumah; (iii) selepas mengambil Toyota, Kamarul memandunya manakala perayu memandu Proton; (iv) mereka bertemu seorang warga Thai dan Kamarul berbual dengannya manakala perayu tidak turut sama; (v) Kamarul kemudian meninggalkan Toyota tersebut dan menyertai perayu menaiki Proton; (vi) selepas makan bersama-sama, perayu menghantar Kamarul berdekatan dengan tempat Toyota diletakkan; (vii) Kamarul, memandu Toyota, dan perayu, memandu Proton, bersetuju untuk berjumpa di sebuah lokasi; (viii) perayu tiba dahulu di lokasi dan apabila Kamarul tiba, dia meletak Toyota bersebelahan Proton; (ix) Kamarul tampil cemas dan, tanpa banyak berbicara, mengambil kunci Proton dan memecut pergi; dan (x) dalam beberapa ketika, perayu ditahan oleh pihak polis. Pada penutup kes pembelaan, hakim bicara, berpuas hati pembelaan gagal membangkitkan keraguan munasabah terhadap kes pihak pendakwaan, mensabitkan perayu atas kesalahan dan menjatuhkan hukuman mati atasnya. Rayuan perayu di Mahkamah Rayuan gagal. Maka timbul rayuan ini. Isu utama yang timbul dalam rayuan ini adalah bersangkutan kewajipan pihak pendakwaan menyediakan buat pihak pembelaan mana-mana saksi yang keterangannya mungkin dapat membantu tertuduh dan pembelaannya.

Diputuskan (membenarkan rayuan)

Oleh Mohd Zawawi Salleh HMP menyampaikan penghakiman mahkamah:

(1) Hak seorang individu untuk membela dirinya terhadap pertuduhan jenayah termasuk hak memperoleh dan mengemukakan lain-lain keterangan yang menyokong pembelaannya. Pihak pendakwaan berkewajipan menyediakan, buat pihak pembelaan, saksi-saksi yang disiasat pihak polis yang daripada mereka pernyataan-pernyataan direkodkan.

(2) Kepentingan orang-orang kena tangkap buat pihak pembelaan jelas ditunjukkan dalam keterangan perayu yang menegaskan bahawa Kamarul yang sebenarnya mempunyai kawalan penuh Toyota yang di dalamnya dadah dijumpai dan dialah orang yang berbual dengan warga Thai tersebut. Pegawai penyiasat mengesahkan dadah itu berasal dari Thailand, seperti yang dilihat daripada guni-guni beras. Objektif perbicaraan adil mensyaratkan agar pihak pendakwaan memanggil orang-orang kena tangkap, atau paling tidak, Kamarul dan warga Thai,

sebagai saksi kecuali jika terdapat alasan yang baik untuk tidak berbuat demikian. Orang-orang kena tangkap ini ditangkap semasa atau berdekatan dengan tangkapan perayu dan berikutan siasatan yang sama. Pihak pendakwaan tidak mengemukakan apa-apa penjelasan atas kegagalan memanggil orang-orang kena tangkap/saksi-saksi ini.

(3) Pegawai penyiasat telah menyiasat orang-orang kena tangkap dan mengemukakan kertas siasatan kepada pihak pendakwaan yang kemudian memutuskan untuk tidak mempertuduh mereka. Dalam hal keadaan ini, pihak pendakwaan tidak boleh mengatakan tidak tahu apakah keterangan yang saksi-saksi ini akan berikan kerana pernyataan mereka telah direkodkan. Pihak pendakwaan seharusnya membuat perancangan wajar agar mereka disediakan buat pihak pembelaan semasa prosiding di Mahkamah Tinggi.

(4) Sabitan dan hukuman bawah s. 39B(1)(a) ADB diketepikan. Pertuduhan perayu dikurangkan menjadi milikan bawah s. 6 dan boleh dikenakan hukuman bawah s. 39A(2) ADB. Perayu dijatuhkan hukuman penjara 18 tahun bermula dari tarikh tangkapannya dan sepuluh sebatan rotan.

Case(s) referred to:
Abdul Latif Sakimin v. PP [2009] MLJU 1828 ***(refd)***
Adel Muhammed El Dabbah v. Attorney General for Palestine [1944] AC 156 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Dyers v. R [2002] 210 CLR 285 ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Lim Young Sien v. PP [1994] 2 SLR 257 ***(refd)***
Mraz v. The Queen [1955] 93 CLR 493 ***(refd)***
Muhammad Kadar And Another v. PP [2011] 3 SLR 1205 ***(refd)***
PP lwn. Klong K'djoanh & Satu Lagi Rayuan [2016] 5 CLJ 533 CA ***(refd)***
PP v. Mohd Fazil Awaludin [2009] 2 CLJ 862 HC ***(refd)***
R v. Banks [1916] 2 KB 621 ***(refd)***
R v. Guerin (1931) 23 Cr App R 39 ***(refd)***
R v. Horace Henry Bryant & Another (1946) 31 Cr App R 146 ***(refd)***
R v. Manning [2017] QCA 23 ***(refd)***
R v. Sugarman (1985) 25 Cr App R 109 ***(refd)***
Richardson v. R [1974] 131 CLR 116 ***(refd)***
Sandra Margaret Birch v. PP [1977] 1 LNS 114 HC ***(refd)***
Tan Foo Su v. PP [1967] 1 LNS 179 HC ***(refd)***
Teh Lee Tong v. Rex [1951] 1 LNS 96 HC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 51A, 180(1)
Dangerous Drugs Act 1952, ss. 6, 37(da), 39A(2), 39B(1)(a)
Federal Constitution, art. 5(1)

For the appellant - Simon Murali & Kok Yuen Lin; M/s Simon Murali & Co
For the respondent - Abdul Ghaffar Ab Latif & Nurul Farhana Khalid; DPPs

Reported by Najib Tamby

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JUDGMENT

Mohd Zawawi Salleh FCJ:

Introduction

B **[1]** The central issue in this appeal concerns the duty of the prosecution to make available to the defence any witness whose evidence may assist the accused in his or her defence. Specifically, the appellant asks this court to determine the following questions of law:

C (i) whether the prosecution has a duty to make available to the defence witnesses who had been investigated by the police and from whom statements had been recorded; and

(ii) if there is such duty, what are the consequences of the failure of the prosecution to uphold this duty.

D **[2]** The charge against the appellant reads as follows:

> Bahawa kamu pada 6 Disember 2014, jam lebih kurang 10.20 malam di Hentian Juru Selatan, Juru, di dalam Daerah Seberang Perai Tengah, dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya jenis 'Cannabis' seberat 112,892 gram. Oleh itu, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan
> E boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Facts

[3] The events giving rise to this appeal took place on 6 December 2014 at about 10.20pm at Hentian Juru Selatan, Seberang Perai Tengah, Pulau
F Pinang, where the appellant was arrested by the police inside a car, Toyota Avanza ("the car"). At the time of the arrest, the car was locked from inside and the engine was still running.

[4] The police had conducted an inspection of the car boot and found five white gunny sacks containing 25 packed cannabis and one remaining gunny
G sack containing 19 packed cannabis ("impugned drugs"). The impugned drugs were seized and handed over to the investigating officer (SP8).

[5] SP8 sent the seized items to the Chemistry Department for analysis and the chemist (SP6) confirmed that the seized items were cannabis weighing 112,892g.

H **[6]** In the course of the trial, SP8 confirmed that there were four individuals whom the police had arrested and investigated subsequent to the arrest of the appellant ("arrestees"). The names of the four arrestees are:

(i) Sahrolnizam bin Mat Yusof;

I (ii) Muhamad Kamarul Hisham bin Mohd Jilani;

(iii) Mohd Fitri bin Andullah; and

(iv) a Thai National by the name of Yeap Tak San.

(Please refer to pp. 363 to 365, rekod rayuan, jilid 3(2)).

[7] It is pertinent to note that after closing its case, the prosecution did not offer these arrestees/witnesses to the defence. The police also did not serve their statements to the defence pursuant to s. 51A of the Criminal Procedure Code ("CPC"). The names of these witnesses do not appear in the prosecution list of witnesses (see "lampiran A - senarai saksi pendakwaan", at p. 39, rekod rayuan, jilid 3(2)).

[8] At the end of the prosecution's case, the learned trial judge found that the prosecution had succeeded in establishing a *prima facie* case against the appellant and the appellant was ordered to enter his defence.

[9] The crux of the appellant's defence was that one Muhamad Kamarul Hisham bin Mohd Jilani ("Kamarul Hisham") was the actual person who at all material times had full control of the car in which the impugned drugs were found. The car was driven by Kamarul Hisham and the appellant denied he had any knowledge of the impugned drugs found in the boot of the car.

[10] The appellant had set out the fact pattern on which he sought to rely in support of his defence. According to the appellant, on 6 December 2014, he followed Kamarul Hisham to a house in Taiping to pick up the car. They went together in a car, a Proton Persona, driven by Kamarul Hisham. Upon arrival at the house, Kamarul Hisham met a lady at the house while the appellant waited outside the gate.

[11] After a brief conversation, Kamarul Hisham gave a piece of paper to the lady and then drove the car out from the lady's house. Thereafter, both of them headed to Kedah; Kamarul Hisham drove the Toyota Avanza car while the appellant was at the wheels of the Proton Persona.

[12] At a location in Kedah, they met a Thai national named Yeap Tak San with whom Kamarul Hisham had a conversation but the appellant was not privy to this conversation. Thereafter, they headed back south where both drove the respective vehicles as mentioned.

[13] They stopped by at a petrol station at Sungai Dua along the southbound PLUS Highway. Then, Kamarul Hisham left the car at the station and took a ride with the appellant in the Proton Persona after which they had meals near a shopping area. Thereafter, the appellant drove back towards Sungai Dua together with Kamarul Hisham, who then requested him to stop at a KFC outlet. The appellant dropped him at the KFC outlet. Kamarul Hisham then picked up the car which happened to be nearby. Both of them drove the respective vehicles out of Sungai Dua and headed south.

[14] Kamarul Hisham then told the appellant that he would meet him at the Juru Rest Area before proceeding further. The appellant obliged and drove the Proton Persona to a parking lot at the Juru Rest Area. He switched off the engine and waited for Kamarul Hisham for a while.

[15] Kamarul Hisham then drove to Juru Rest Area and parked the car beside the Proton Persona with the engine still running. Kamarul Hisham then appeared anxious and without saying much grabbed the keys of the Proton Persona from the appellant's hand, got in and drove off speedily.

[16] The appellant was puzzled by the strange conduct of Kamarul Hisham. Within moments, a car came at the side where the appellant was standing, from which a group of individuals in plainclothes appeared. They informed him that they were police and wanted to know what was inside the car. The appellant told them that the driver of the car was his friend, Kamarul Hisham.

[17] As we have alluded to earlier, the car was inspected by the police officers, who then found some rice gunny sacks containing plastic packets in the boot. The appellant fervently denied any knowledge about the plastic packets. The police then arrested the appellant. The appellant later came across both Kamarul Hisham and the Thai national in the police lock-up where they were all remanded. The appellant came to know from the conversation he had with them that Kamarul Hisham and the Thai national were dealing in drugs and the car was used as the vehicle for the crime.

[18] At the end of the case, the learned trial judge found that the appellant had failed to cast a reasonable doubt on the prosecution's case and had also failed to rebut the statutory presumption of trafficking under s. 37(da) of Dangerous Drugs Act 1952 ("DDA" 1952"). Consequently, the appellant was convicted and sentenced to death.

[19] Dissatisfied with the decision, the appellant appealed to Court of Appeal. The Court of Appeal dismissed the appeal and affirmed the conviction and sentence rendered by the trial judge.

[20] The appellant appealed to this court. Hence, this appeal before us.

Parties' Competing Submissions

[21] In essence, learned counsel for the appellant submitted that the prosecution has a duty to make available to the defence all the witnesses who had been investigated and from whom statements had been recorded. This duty assumes crucial significance whenever the prosecution decides not to call these witnesses to support its case. Learned counsel informed the court that in practice the prosecution exercises this duty by offering such witnesses to the defence after the close of its case and before the trial court hears submissions on whether a *prima facie* case has been established under s. 180(1) of the CPC.

[22] In support of his submission, reliance was placed on the English Court of Criminal Appeal case of *R v. Horace Henry Bryant & Another* (1946) 31 Cr App R 146, where the court recognises that the prosecution has a duty to make a person who can give material evidence available to defence if they decide not to call him.

[23] Learned counsel also referred us to the pre-Merdeka case of *Teh Lee Tong v. Rex* [1951] 1 LNS 96; [1956] 1 MLJ 194 where the court held that all witnesses whose statements have been taken should be brought to court by the prosecution, except those whose evidence will clearly and obviously throw no light on the case; and any witness not so brought to court must be made available to the accused should he desire to call such witness.

[24] The appellant relied heavily on the decision of this court in *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 where in the course of his judgment, Edgar Joseph Jr FCJ cited with approval passages from the Australian case of *Richardson v. R* [1974] 131 CLR 116, where the relevant excerpt reads (at p. 6):

> ... Secondly, there is room for some debate as to what is meant by the opening words of the statement and it should not be read as inhibiting the discretion which the prosecutor has not to call in the Crown case any eye-witness if he judges that there is sufficient reason for not calling him, as, for example, where he concludes that the witness is not a credible and truthful witness. **In this event the prosecutor will ensure that the accused is given the opportunity to call the witness**. (emphasis added)

(See also *Lim Young Sien v. PP* [1994] 2 SLR 257].

[25] Based on the authorities cited above, learned counsel posited that it is a well-entrenched principle that the prosecution has an inviolable duty under the law to make available and offer to the defence all the witnesses from whom statements have been taken and whom it decides not to call to testify before the court.

[26] Learned counsel further submitted that the consequence of the prosecution's failure to make available these witnesses to the defence is a denial of the appellant's right to a fair trial and the appellant had been deprived an opportunity to present his case in the best manner as possible with a view to securing an acquittal. (See *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 (FC)).

[27] In reply, learned Deputy Public Prosecutor informed the court that the correct fact was that Kamarul Hisham and the other three arrestees were arrested and further investigated under IP No. 1768 and not under Bukit Merah Report No. 12992/14, the arrest report of the appellant. (See the evidence of SP8 at pp. 355 to 356, rekod rayuan, jilid 3(2)). Learned Deputy Public Prosecutor argued that there was no necessity for the prosecution to include these names under the list of witnesses (senarai saksi pendakwaan)

due to the fact that the appellant was alone at the time of his arrest in Juru Rest Area. Insofar as Kamarul Hisham is concerned, he was apprehended at a different place ie, at Tol Changkat Jering and also at a different time.

[28] Learned Deputy Public Prosecutor further submitted that the High Court and the Court of Appeal were correct in holding that the failure to call the arrestees as witnesses for the prosecution was not fatal to the prosecution's case. The High Court and the Court of Appeal recognised the prosecutorial discretion on the calling of witnesses and there was no evidence on record showing that the prosecution had attempted to suppress the facts from the court by not calling these witnesses or that the appellant indeed had been prejudiced as a result of the non-calling of these witnesses (see *Abdul Latif Sakimin v. PP* [2009] MLJU 1828; and *PP lwn. Klong K'djoanh & Satu Lagi Rayuan* [2016] 5 CLJ 533).

Our Analysis And Findings

[29] We begin with the discussion on the proper role of the prosecutor. The prosecutor in a criminal trial occupies a special position. His or her role is unlike the counsel for a party in a civil trial or counsel for the accused. Unlike other clients who have interest in securing a conviction at all costs, prosecutors are often called "minister of justice" and their role is to present the whole case to the court and assist the court in finding out where the truth lies. Due to their special role in criminal trials, the prosecutors are under several well-defined duties including: (i) duty of disclosure (see s. 51A of the CPC); (ii) duty to call all credible and relevant witnesses; and (iii) duty to conduct the case fairly. (See *R v. Banks* [1916] 2 KB 621; *R v. Sugarman* (1985) 25 Cr App R 109; and *Muhammad Kadar And Another v. PP* [2011] 3 SLR 1205).

[30] We would like to emphasise that, at all times, prosecutors are expected to present their case fairly, impartially and professionally and assist the court in arriving at the truth by producing all the relevant facts to the court as "officer of the court" (see *R v. Guerin* (1931) 23 Cr App R 39).

[31] In *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 4 AMR 292 (FC), this court observed at (p. 287 (CLJ); p. 310 (AMR)):

> The right to a fair trial is of course a universal principle. It is inviolable.

The same case quoted with approval a passage from the judgment of Mohd Zawawi Salleh JC (now FCJ) in *PP v. Mohd Fazil Awaludin* [2009] 2 CLJ 862; [2009] 7 MLJ 741, which reads:

> The principle of a fair trial is sacrosanct in all civilised legal jurisdictions. It is a principle of universal application. In Malaysia, the principle of fair trial and fairness have been long established and recognised in several decisions.

[32] In *Lee Kwan Woh v. PP* (*supra*) the court quoted a passage from the judgment of Wilfred Kelsham Fullagar J in the Australian case of *Mraz v. The Queen* [1955] 93 CLR 493, which reads at (p. 649):

> ... every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. *If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law.* (emphasis added)

[33] The right to a fair trial is implied in art. 5(1) of the Federal Constitution. In *Lee Kwan Woh v. PP* (*supra*), the court stated:

> Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within reasonable time by an impartial court established by law.

[34] We accept the submission advanced by learned Deputy Public Prosecutor that the prosecution is solely responsible for deciding how to present its case and choosing which witnesses to call. The *dictum* of Lord Thankerton in the case of *Adel Muhammed El Dabbah v. Attorney General for Palestine* [1944] AC 156 at pp. 168-9; [1944] 2 All ER 139 that "the court will not interfere with the exercise of that discretion, unless, perhaps it can be shown that the prosecutor has been influenced by some oblique motives" has been followed and accepted by our courts. Having said that, we hasten to add that the discretion is not unfettered. The prosecution must exercise his or her power to choose which witness to call consistent with the requirement of fairness. He or she is under a duty to call all credible witnesses whose evidence is essential to fully presenting the narrative of the case. The obligation to call witnesses is sometimes expressed in terms of prosecution's duty to call "material witnesses". "Material" has a wide meaning and in this context, it is evidence which is admissible and capable of influencing the court's assessment of guilt or otherwise is capable of being material (see *Dyers v. R* [2002] 210 CLR 285, [2002] HCA 45 at para. [11]; and *R v. Manning* [2017] QCA 23 at para. [19]. Unless there is a good reason for not calling the witnesses, prosecutors should call all eye witnesses to the events constituting the alleged offence.

[35] We do not wish to lay down any rules to fetter the prosecution's discretion on a matter such as this which is so dependent on the particular circumstances of each case. However, generally speaking, we say the prosecution does not need to call a witness if his or her evidence:

(i) is likely to be unreliable, untrustworthy or otherwise incapable of belief;

(ii) is likely to be unnecessary repetitions in light of the number of witnesses available for the proof of the matter on which they would give evidence; and

A (iii) relates to an issue which has been raised by the defence and on which the defence bears the onus of proof.

[36] The above examples are not meant to be exhaustive, but merely a general guide.

B **[37]** We now turn to the mainstream of the present appeal. The nub of learned counsel's argument is not about the failure of the prosecution to call these arrestees as its witnesses but the critical issue is the failure of the prosecution to make them available to the defence. No explanation was proffered by prosecution on this failure.

C **[38]** In our view, it is settled law based on the authorities cited to us by learned counsel for the appellant in his submission that the prosecution has discretion whether to call any particular witness, but such discretion is subject to two limitations, *viz* (i) the discretion must be exercised with due regard to considerations of fairness and good faith; and (ii) the witnesses who D had been investigated by the police and from whom the statements have been recorded must be offered to the defence.

[39] On the factual matrix of the present appeal, the importance of these witnesses to the defence is clearly demonstrated from the evidence of the appellant, who averred that the said Kamarul Hisham was the actual person E who has full control of the car in which the impugned drugs were found. The appellant testified that it was Kamarul Hisham who engaged in a discussion with the Thai national, Yeap Tak San. The investigating officer (SP8) herself confirmed that the impugned drugs originated from Thailand as can be seen from the rice gunny sacks in which the impugned drugs were found. SP8's F evidence during re-examination reads:

> SP8: Semasa siasatan dijalankan, mendapati dadah tersebut dari Thailand tetapi saya tidak mendapat maklumat yang terperinci tentang tarikh dan masa dadah tersebut dibawa masuk ke dalam Malaysia, Y.A.

G **[40]** In our view, the objective of a fair trial requires the prosecutor to call the arrestees or at the very least Kamarul Hisham and the Thai national as witnesses unless there is some good reason not to do so. The prosecution did not proffer any explanation for the non-calling of these witnesses. These witnesses are persons who had been arrested contemporaneous or in H proximity to the arrest of the appellant and pursuant to the same investigation.

[41] SP8 confirmed that there were other arrests made subsequent to the arrest of the appellant. The notes of proceedings at pp. 361 to 365 of rekod rayuan, jilid 3(2) reveal the following:

I

Maanveer Singh	:	Insp. Pada Tarikh sebelum ini iaitu pada 4/1/2018 Insp. telah memberi keterangan di mahkamah dan Insp. telah memberitahu bahawa terdapat tangkapan-tangkapan lain bersangkut kes ini. Insp. ingat tak berapa orang yang ditangkap selain Rosli?
SP8	:	4 orang, Y.A.
Maanveer Singh	:	So campur dengan Rosli, 5 orang?
SP8	:	5 orang, Y.A.
Maanveer Singh	:	Untuk kes ini Insp. I.O kan?
SP8	:	Benar, Y.A.
Maanveer Singh	:	Dan untuk kes ini Insp. ada beritahu bahawa seorang warga Thailand juga telah ditahan, betul?
SP8	:	Benar, Y.A.
Maanveer Singh	:	Dan Insp. ada siasat dadah yang telah dirampas berasal dari mana?
SP8	:	Berdasarkan siasatan kes ini menunjukkan dadah tersebut daripada Negara Thailand.
Maanveer Singh	:	Dan untuk kes ini seorang warga Thailand ditangkap?
SP8	:	Untuk makluman Y.A. untuk kes bersangkut Bukit Tengah 12992/14 tiada tangkapan lelaki Thailand tetapi tangkapan lelaki Thailand adalah report lain yang bersangkut dengan kes ini.
Maanveer Singh	:	IP 1 kan?
SP8	:	IP satu saja.

[42] The notes of proceedings at p. 377 clearly confirmed that the statements of all the arrestees had been taken by SP8. The relevant part of p. 377 is reproduced as hereunder:

Manveer Singh	:	Insp. ada ambil keterangan-keterangan kesemua empat orang yang ditahan. Setuju?
SP8	:	Setuju, Y.A.

[43] The investigating officer (SP8) had investigated all these witnesses and submitted the single set of investigation papers to the Deputy Public Prosecutor who then decided not to charge them. In the circumstances, the prosecution cannot be heard to say that it did not know what evidence these witnesses would give because statements had been recorded from them. Necessary arrangements should have been made by the prosecution to make them available to the defence during the proceedings in the High Court.

[44] We agree with the submission of learned counsel for the appellant that the learned trial judge and the Court of Appeal had committed serious misdirection in placing the burden on the appellant to call these witnesses to establish his defence that Kamarul Hisham was the actual trafficker and the failure to do so was a decisive factor in the assessment of the defence case.

[45] It is trite law that it is not the duty of the appellant to prove his innocence or to call a particular witness to support his defence (see *Tan Foo Su v. PP* [1967] 1 LNS 179; [1967] 2 MLJ 19; and *Sandra Margaret Birch v. PP* [1977] 1 LNS 114; [1978] 1 MLJ 72). The law places upon the prosecution the burden to prove guilt of the appellant beyond reasonable doubt and not on the appellant to prove his innocence. Well-entrenched in jurisprudence is the rule that the conviction of the appellant must rest not on the weakness of the defence but on the strength of the prosecution. This principle is the corner stone of our criminal law.

[46] Before parting, we consider it apposite to emphasise that a person's right to defend himself or herself against a criminal charge includes the right to obtain and adduce other evidence in support of his or her defence. It is desirable in the interest of justice for the defence to obtain the fullest possible access to the facts relevant to the issue in the case. In this regard, the prosecution has a duty to make available to the defence witnesses who had been investigated by the police and from whom the statements have been recorded. This is, as we alluded to earlier, an important or vital corollary or element of an accused's right to a fair trial.

[47] For all those reasons, we allowed the appellant's appeal and set aside the conviction and sentence under s. 39B(1)(a) of the DDA 1952.

[48] Having examined the evidence in its entirety, we are of the considered opinion that this is a fit and proper case for us to reduce the charge against the appellant from s. 39B(1)(a) of the DDA to one of possession under s. 6 and punishable under s. 39A(2) of the DDA 1952.

[49] After considering the mitigating factors submitted by learned counsel and the aggravating factors advanced by learned Deputy Public Prosecutor , we sentence the appellant to 18 years of imprisonment with effect from the date of his arrest (6 December 2014) and ten strokes of cane.